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No. 82-497

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALBERTA GAS CHEMICALS, LTD.,

Petitioner,

—vs.—

CELANESE CORPORATION and
CELANESE CHEMICAL COMPANY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN ASA ROUNTREE, III
(Counsel of Record)
STEVEN KLUGMAN
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022
(212) 909-6000

Attorneys for Respondents Celanese Corporation and Celanese Chemical Company, Inc.

November 4, 1982

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is there a common-law cause of action for damages when the only alleged wrongdoing is perjury by the defendant before the United States International Trade Commission in an antidumping proceeding?

2. Does a United States District Court, in a diversity action, have jurisdiction over a collateral attack on a determination made by the United States International Trade Commission in an antidumping proceeding?

DESIGNATION OF CORPORATE RELATIONSHIPS

Respondent Celanese Corporation has no parent company. Celanese Corporation has the following subsidiaries (other than wholly owned subsidiaries) and affiliates: Acidos, S.A.; Bodegas Industriales, S.A.; Celanese Canada Inc.; Celanese Mexicana, S.A.; Compahnia Alcoalquimica Nacional; Convertidora Textil, S.A.; Convertidores Unidos, S.A.; Copenor-Compahnia Petroquimica do Nordeste; CTE Petrochemicals Company; Derivados Macroquimicos, S.A.; Fenoquimia S.A.; Fiber Industries, Inc.; Fibras Industriales S.A.; H & K Limited; Hager & Kassner do Brasil (Productos Quimicas Ltda. Brazil); Hager & Kassner GmbH; Halocarburos, S.A.; Hindustan Gum & Chemicals Limited; Hopewell International Company Ltd.; Immobiliaria Sercel, S.A.; Impatex A.G.; Indal Industrias de Alfarroba, Ltda.; Induqium S.A. de C.V.; Industrias Quimicas de Mexico, S.A.; Industrias Quimicas Synres, S.A.; JCM Company, Limited; NAGUM-Natural Gum Industry, Ltd.; National Methanol Company; Pace Products Inc.; Pakistan Gum & Chemicals Limited; Polycel de Mexico, S.A.; Polydoublure, S.A.; Polyenvases de Mexico, S.A.; Polyplastics Co., Ltd.; Promociones Sociales Mexicanas, S.C.; Pumyang Industrial Co., Ltd.; Quimica da Bahia Industria e Commercil S.A.; Rayon y Celanese Peruana S.A.; Recuperados de Puebla, S.A.; RV Chemicals, Ltd.; Servicases, S.A.; Tenngasco Gas Gathering Co.; Tereftalatos Mexicanos, S.A.; Ticona Polymerwerke GmbH; UCB Chemicals Corp.; United Insurance Company; Universal Insurance Company of Ireland, Ltd.; Univex, S.A.; Viopol Chemical and Industrial S.A.; and Virchem S.A.

Respondent Celanese Chemical Company, Inc., is a wholly owned subsidiary of Celanese Corporation. Its affiliates (other than wholly owned subsidiaries of Celanese Corporation) are set forth above. The only subsidiary of Celanese Chemical Company, Inc. (other than wholly owned subsidiaries), is Tenngasco Gas Gathering Co.

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STATUTES INVOLVED

Section 1582(a) of the Judicial Code, 28 U.S.C. § 1582(a), which was in effect when this action was commenced, conferred on the United States Customs Court (now known as the United States Court of International Trade) exclusive jurisdiction over all "civil actions" challenging antidumping determinations made by the United States International Trade Commission. The successor to 28 U.S.C. § 1582(a), 28 U.S.C. § 1581(c), which became effective on November 2, 1980, confers such exclusive jurisdiction on the Court of International Trade. The text of these statutes is set forth in Appendix 1 hereto.

COUNTERSTATEMENT OF THE CASE

In this action, petitioner Alberta Gas Chemicals, Ltd. ("Alberta Gas"), seeks damages for alleged perjury before the United States International Trade Commission (the "Commission") by employees of respondent Celanese Chemical Company, Inc., a subsidiary of respondent Celanese Corporation (App. G).[1] (Respondents are collectively referred to herein as "Celanese".) Federal jurisdiction is based solely on diversity of citizenship (App. G-2). No antitrust claim is asserted.

Celanese's alleged perjury occurred during antidumping proceedings relating to Canadian methyl alcohol ("methanol") conducted by the Commission in May 1979, pursuant to the Antidumping Act of 1921, 19 U.S.C. § 160 *et seq.*[2] The result of those proceedings was a determination by the Commission that there was a likelihood that the domestic methanol industry would be injured by sales of Canadian methanol at less than fair value. 44 Fed. Reg. 40,734 (July 12, 1979). That determination was based on testimony from numerous witnesses (including two employees of Celanese), written submissions, answers to questionnaires, personal interviews, and information from other sources. *Id.* at 40,735. The determination did not refer to any testimony by Celanese's employees.

The Commission's determination of likelihood of injury resulted in a Finding of Dumping, which subjected imports of Canadian methanol to antidumping duties. 44 Fed. Reg. 44,154 (July 27, 1979). Alberta Gas was at that time the sole importer of Canadian methanol, and its alleged damages stem from this Finding of Dumping.

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1 Citations in the form "App. G" are to the appendices to Alberta Gas's petition.

2 In 1979, Congress repealed the Antidumping Act of 1921, which governed these proceedings, and amended the Tariff Act of 1930, 19 U.S.C. § 1671 *et seq.*, to include analogous provisions.

On August 20, 1979, Alberta Gas (acting through a subsidiary) commenced an action in the United States Customs Court, pursuant to 28 U.S.C. § 1582, challenging the Finding of Dumping and the Commission's determination of likelihood of injury which had entered into that Finding. This challenge was based on several grounds. Perjury was not one of them. On May 28, 1981, the Customs Court (renamed the Court of International Trade) reversed the Commission's determination on grounds of insufficient evidence. *Alberta Gas Chemicals, Inc. v. United States*, 515 F. Supp. 780 (Ct. Int'l Trade 1981). As a result, the Finding of Dumping was vacated.

In the meantime, on April 2, 1980, Alberta Gas commenced this action in the United States District Court for the Southern District of New York. This was nine months after the Commission's determination and six months after Alberta Gas's purported discovery of perjury by Celanese. At that time, although Alberta Gas's action was pending before the Court of International Trade, Alberta Gas made no attempt to raise the perjury charge before that court.

In the instant action, the complaint alleges that Celanese presented false testimony to the Commission. The alleged perjury was (*i*) that Celanese, in its testimony, projected that the domestic demand for methanol would increase at an annual rate of 7% instead of 10% and (*ii*) that Celanese concealed plans to construct a methanol production facility in Canada (App. G-3). The complaint further alleges that, but for such testimony, the Commission would not have reached its determination that the importation of Canadian methanol at less than fair value was likely to cause injury to the United States methanol industry (App. G-3). This allegation is made despite the fact that neither the Commission's determination nor the opinion of the Court of International Trade mentions the testimony of Celanese and despite the fact, which is made clear by the decision of the Court of International Trade, that neither the testimony given by Celanese nor the information

purportedly withheld by Celanese was harmful to Alberta Gas's position before the Commission.[3]

Celanese answered the complaint, denying that it had committed perjury, and then moved for judgment on the pleadings. On October 8, 1980, the District Court (Sofaer, District Judge) dismissed the complaint on the ground that under common law there is no private damage action for perjury (App. A). The District Court added that subject-matter jurisdiction seemed "dubious" (App. A-5).

On appeal, the Court of Appeals for the Second Circuit held on May 12, 1981, that the Commission had primary jurisdiction of two issues: whether Celanese had committed perjury and, if so, whether, but for such perjury, the Commission would have reached a different determination (App. B). Accordingly, the Court of Appeals remanded the case to the District Court with instructions to stay further proceedings until the Commission had addressed those issues (App. B-9).

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3 The Court of International Trade reversed the determination of the Commission because it was based on two erroneous findings: (*i*) "that there would be no future expansion in the United States consumption of methyl alcohol," 515 F. Supp. at 791, and (*ii*) that there was a likelihood of "expanding supplies of methyl alcohol from Canada." *Id.* at 790. In making the first finding, the Commission either ignored or rejected the testimony of Celanese that U.S. consumption of methanol would rise at an annual rate of 7%. As for the second finding, if Celanese had testified that it planned to construct a facility in Canada and thereby increase Canadian supplies of methanol, such testimony would have supported the Commission's finding.

In view of all this, one might well wonder why Alberta Gas commenced the instant action. The answer may lie in the timing of the commencement of the action. The filing of the complaint, six months after Alberta Gas's "discovery" of the purported perjury, did not coincide with any new event relating to the antidumping proceeding. The filing of the complaint (as well as the publicity given thereto in the Canadian press) *did*, however, coincide with the scheduling in Canada of a hearing on an application by Celanese for a permit to construct a methanol production facility in Canada. Alberta Gas was vigorously opposing that application.

The Court of Appeals explicitly declined to consider whether the complaint stated a claim for relief or whether the District Court had subject-matter jurisdiction (App. B-9).

On June 17, 1981, Alberta Gas filed with the Commission a petition requesting that it address the issues identified by the Court of Appeals (*see* App. D-1). The Commission declined to do so because, by that time, the Commission's determination had been vacated by the Court of International Trade (App. H). The Commission explained that its determination had been "effectively rendered . . . a nullity" by the reversal and vacatur of the Finding of Dumping, thereby "obviat[ing] the necessity for reopening the Canadian methanol matter" (App. H-2).[4] The Commission then referred Celanese's testimony to the Department of Justice for investigation (App. H-3). Upon review, the Department of Justice declined to prosecute.[5]

After the Commission denied Alberta Gas's request for relief, Alberta Gas moved the District Court to lift its stay. Celanese cross-moved for judgment on the pleadings. On December 11, 1981, the District Court dismissed the complaint for failure to state a claim and for lack of subject-matter jurisdiction (App. D). On May 28, 1982, a unanimous panel of the Court of Appeals (Feinberg, Chief Judge, and Lumbard and Newman, Circuit Judges) affirmed (App. E). On July 14,

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4 Alberta Gas's characterization of the Commission's decision as resting "on the ground that the Commission had no procedure to hear" the issue of Celanese's alleged perjury (Petition at 6) is incorrect. The Court of Appeals held that, under the "universally accepted rule" that courts and agencies have the inherent power to protect the integrity of their own proceedings, the Commission was empowered to hear and decide that issue (B-6–B-8). The Commission did not disagree. It simply concluded that there was no need to correct its determination because that determination had been nullified. The Commission then added that it had no jurisdiction to decide whether a crime had been committed before it (App. H-2–H-3).

5 The position of the Justice Department is set forth in a letter of December 4, 1981, a copy of which is Appendix 2 hereto.

1982, rehearing was denied, with no votes in support of rehearing (App. F).

SUMMARY OF ARGUMENT

Alberta Gas's petition for a writ of certiorari should be denied for the following reasons:

1. There is no conflict between the decision by the Court of Appeals and any decision by any other Court of Appeals. This is an action brought at common law to recover damages for alleged perjury. It is not an antitrust action. In affirming the dismissal of the complaint, the Court of Appeals applied the universal common-law rule that there is no private damage action for perjury. The cases now relied on by Alberta Gas construe the scope of the antitrust laws. Those cases are inapposite because Alberta Gas does not allege that Celanese violated the antitrust laws.

2. The Court of Appeals correctly held that the District Court lacked subject-matter jurisdiction over Alberta Gas's action because the Court of International Trade has exclusive jurisdiction over challenges to determinations made by the International Trade Commission. This holding does not conflict with any decision by any other Court of Appeals. This holding also promotes the integrity and efficient operation of the customs tribunals.

ARGUMENT

The case that Alberta Gas seeks to present to this Court is very different from the case that was litigated and decided below. Below, the only substantive issue was whether Alberta Gas had stated a claim for relief in the face of the universal common-law rule prohibiting private damage actions for perjury. Now, for the first time, Alberta Gas presents the case as if it had alleged that Celanese was guilty of an antitrust violation including, among other things, the submission of false infor-

mation to an administrative agency, and as if Celanese were seeking antitrust immunity under the *Noerr-Pennington* doctrine.[6] That is not this case.

I.

The Decision Below Does Not Conflict with Any Decision by Any Other Court of Appeals.

In this action, Alberta Gas alleges that Celanese committed perjury before the Commission. Celanese is charged with no other wrongdoing whatsoever. No violation of the antitrust laws is asserted. Therefore, under the rule prohibiting damage actions for perjury, the complaint fails to state a claim (App. A-3–A-5).

A. The Rule of Law Applied by the Court Below Is Universally Followed.

In holding that Alberta Gas failed to state a claim, the Court of Appeals followed the universal rule that, at common law, "no action lies to recover damages caused by perjury." 70 C.J.S. *Perjury* § 92, at 552 (1951 & 1979 Supp.). *Accord*, Annot., 54 A.L.R.2d 1298, at 1317-19 (1957 & 1978 Supp.). As stated recently by a federal district court:

> "It is fundamental that in the absence of statute an unsuccessful litigant may not maintain a civil suit for damages against a person for alleged perjury committed by him in a civil action, a criminal prosecution or other proceeding, either as a party or as a witness." *Smith v. Sinclair*, 424 F. Supp. 1108, 1113 (W.D. Okla. 1976) (citations omitted).

More than eighty years ago, a New York court referred to the "entire unanimity of judicial opinion" on this issue. *Young*

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6 *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

v. Leach, 27 A.D. 293, 296, 50 N.Y.S. 670, 671 (1st Dep't 1898). The unanimity of this "ancient rule," *Newin Corp. v. Hartford Accident & Indemnity Co.*, 37 N.Y.2d 211, 217, 333 N.E.2d 163, 166, 371 N.Y.S.2d 884, 889 (1975), survives to this day and "is followed by . . . the Federal Courts," *Liddell v. Smith*, 345 F.2d 491, 494 (7th Cir. 1965), as well as by all other courts that have addressed the issue.[7] This rule required dismissal of Alberta Gas's complaint.

At first glance, the rule against private damage actions for perjury may seem to be a harsh rule. In some individual cases—although not in this case—it may indeed be a harsh rule. But the policy reasons behind the rule justify any hard-

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7 *See, e.g., United States v. Throckmorton*, 98 U.S. 61 (1878); *Charles v. Wade*, 665 F.2d 661 (5th Cir. 1982); *Liddell v. Smith*, 345 F.2d 491 (7th Cir. 1965); *Levy v. Hayward*, 248 F.2d 152 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 941 (1958); *Chase v. Brecke*, 509 F. Supp. 241 (D. Minn. 1981); *Smith v. Sinclair*, 424 F. Supp. 1108 (W.D. Okla. 1976); *Merritt-Chapman & Scott Corp. v. Elgin Coal, Inc.*, 358 F. Supp. 17 (E.D. Tenn. 1972), *aff'd without opinion*, 477 F.2d 598 (6th Cir. 1973); *Maicobo Investment Corp. v. Von Der Heide*, 243 F. Supp. 885 (D. Md. 1965); *Ragsdale v. Watson*, 201 F. Supp. 495 (W.D. Ark. 1962); *Robinson v. Missouri Pacific Transportation Co.*, 85 F. Supp. 235 (W.D. Ark. 1949); *Hokanson v. Lichtor*, 5 Kan. App. 2d 802, 626 P.2d 214 (1981); *Alexander v. City of Peekskill*, 80 A.D. 2d 626, 436 N.Y.S.2d 327 (2d Dep't 1981); *Serrano v. Flight Motel, Inc.*, 95 Misc. 2d 669, 408 N.Y.S.2d 198 (Sup. Ct. Queens Co. 1978); *Kachig v. Boothe*, 22 Cal. App. 3d 626, 99 Cal. Rptr. 393 (4th Dist. 1971); *W.G. Platts, Inc. v. Platts*, 73 Wash. 2d 434, 438 P.2d 867 (1968); *Morris v. Nowotny*, 398 S.W.2d 661 (Tex. Civ. App. 1966); *John Allan Co. v. Brandow*, 59 Ill. App. 2d 328, 207 N.E. 2d 339 (3d Dist. 1965); *Bromund v. Holt*, 24 Wis. 2d 336, 129 N.W.2d 149 (1964); *Morris v. Taylor*, 353 S.W.2d 956 (Tex. Civ. App.), *cert. denied*, 371 U.S. 842 (1962); *Gillikin v. Springle*, 254 N.C. 240, 118 S.E.2d 611 (1961); *Brewer v. Carolina Coach Co.*, 253 N.C. 257, 116 S.E.2d 725 (1960); *Agnew v. Parks*, 172 Cal. App. 2d 756, 343 P.2d 118 (2d Dist. 1959); *Anchor Wire Corp. v. Borst*, 277 A.D. 728, 102 N.Y.S.2d 871 (1st Dep't 1951); *Kinter v. Kinter*, 84 Ohio App. 399, 87 N.E.2d 379 (1949); *Kantor v. Kessler*, 40 A.2d 607 (N.J. 1945).

ship that it may occasion in specific cases. Those reasons are as follows:

> 1. The rule reflects the desirability of putting an end to litigation and avoiding the situation whereby a losing party could return to the fray with a charge of perjury, to be followed by a similar charge by the losing party in the second proceeding, and so on. *See, e.g., United States v. Throckmorton*, 89 U.S. 61, 65 (1878).
>
> 2. The rule advances judicial economy and propriety by requiring that an attack on a prior decision be brought directly before the tribunal that rendered the decision, rather than collaterally. *See, e.g., Maicobo Investment Corp. v. Von Der Heide*, 243 F. Supp. 885, 893 (D. Md. 1965).
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> 3. The rule serves to encourage witnesses to come forward without fear of later damage actions. *See, e.g., Charles v. Wade*, 665 F.2d 661, 666 (5th Cir. 1982); *Nichols v. Alker*, 231 F.2d 68, 80 (2d Cir.), *cert. denied*, 352 U.S. 829 (1956) (Frank, J., concurring).
>
> 4. The rule leaves to the criminal law, with its procedural safeguards, the evaluation and prosecution of perjury charges. *See, e.g., Merritt-Chapman & Scott Corp. v. Elgin Coal, Inc.*, 358 F. Supp. 17, 22 (E.D. Tenn. 1972), *aff'd*, 477 F.2d 598 (6th Cir. 1973).

In the court below, Alberta Gas did not dispute the validity of this rule. Alberta Gas argued only that its complaint fell within a narrow exception, which permits a damage action when the perjury is "but an incident" to a larger fraudulent scheme. *Nichols v. Alker*, 231 F.2d 68, 80-81 (2d Cir.), *cert. denied*, 352 U.S. 829 (1956) (Frank, J., concurring). That exception applies only when a plaintiff alleges "fraudulent conduct beyond the giving of false testimony." *Levy v. Hayward*, 248 F.2d 152, 153 (D.C. Cir. 1957), *cert. denied*, 356

U.S. 941 (1958). Here, however, Alberta Gas has alleged no wrongdoing other than perjury. This is not a mere defect in pleading. In fact, in the District Court, Alberta Gas "was offered the opportunity at oral argument to amend the complaint so as to allege fraudulent conduct other than the perjury, but declined to do so" (App. A-4). Alberta Gas's complaint therefore falls squarely within the rule, not the exception (App. A-3–A-5).

B. The Decisions Relied On by Alberta Gas Are Entirely Inapposite.

In its petition to this Court, Alberta Gas ignores the common-law rule that there is no private cause of action for perjury, as well as the legion of authority that supports that rule. Instead, Alberta Gas relies on three antitrust cases, *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252 (9th Cir. 1982); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); and *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272 (D.C. Cir. 1972). Alberta Gas asserts that these cases hold "that a party can maintain a private cause of action for damages suffered by it as a result of misrepresentations made to an administrative agency by another party" (Petition at 7) and that therefore these cases are in conflict with the decision below. This simply is not so.

Each of the cases relied on by Alberta Gas was an antitrust action. In each of those cases, the plaintiff had stated all the elements of an antitrust violation. In each of those cases, the issue was whether, in an antitrust context, the filing of false information with an administrative agency comes within the *Noerr-Pennington* doctrine, which, on First Amendment grounds as well as other grounds, exempts from antitrust liability joint efforts to influence legislative or executive action, even when such efforts are designed to injure or eliminate

competition.[8] In each of those cases, it was held that the filing of false information with an administrative agency does not come within the exemption. The basis for that holding was stated by the District of Columbia Circuit in *Israel*:

> "No actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption." 466 F.2d at 278.

In other words, as stated by the Ninth Circuit in *Clipper Exxpress*, "so long as the elements of an antitrust claim are alleged," the filing of false information with an administrative agency does not come within the exemption of *Noerr-Pennington*. 674 F.2d at 1272. But that rule is inapplicable here. No antitrust claim has been asserted by Alberta Gas, and no *Noerr-Pennington* exemption has been sought by Celanese. This is a common-law damage action for perjury, and there is nothing whatsoever in *Clipper Exxpress*, *Woods Exploration*, or *Israel* which suggests that any such action can be maintained.

II.

The District Courts Do Not Have Jurisdiction Over Collateral Attacks on Determinations by the International Trade Commission.

Virtually ignoring the arguments it made below, Alberta Gas now contends that the dismissal of its collateral attack on the determination of the Commission would be subversive of the integrity of the Commission's processes (Petition at 9-11, 15). Quite the contrary is true.

The procedures for challenging determinations made by the Commission are clearly set forth in federal statutes. In 28

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8 *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

U.S.C. § 1582 (and its successor, 28 U.S.C. § 1581), Congress has vested in the Court of International Trade (formerly the Customs Court) exclusive jurisdiction to review the Commission's determinations. In 28 U.S.C. § 1541(a), Congress has vested in the Court of Appeals for the Federal Circuit (formerly the Court of Customs and Patent Appeals) exclusive appellate jurisdiction over judgments of the Court of International Trade. These statutes reflect the decision of Congress that the efficiency and integrity of the customs laws and customs tribunals will be best protected if questions involving the customs laws, including determinations by the Commission, are decided exclusively by the Court of International Trade and, upon further appeal, by the Court of Appeals for the Federal Circuit. These tribunals provide a "complete system of corrective justice with respect to matters arising under the customs laws." *Cottman Co. v. Dailey*, 94 F.2d 85, 88 (4th Cir. 1938) (App. A-5-A-6).

In the case at bar, under 28 U.S.C. § 1582 (and its successor, 28 U.S.C. § 1581), the District Court, sitting in diversity, lacked subject-matter jurisdiction over Alberta Gas's collateral attack on the Commission's determination. This result is consistent with all other judicial constructions of 28 U.S.C. § 1582. The courts have uniformly held that Congress "intended that matters involving customs laws should be heard by one tribunal so that uniformity of decision would result." *Jerlian Watch Co. v. United States Department of Commerce*, 597 F.2d 687, 691 (9th Cir. 1979). *Accord, Consumers Union of United States, Inc. v. Committee for Implementation of Textile Agreements*, 561 F.2d 872 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 933 (1978); *J.C. Penney Co. v. United States Treasury Department*, 439 F.2d 63 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); *Barclay Industries, Inc. v. Carter*, 494 F. Supp. 912 (D.D.C. 1980).

As the District Court observed, Alberta Gas's collateral attack on the Commission's determination sought a *de facto* reversal of the Commission's determination by shifting the resultant antidumping duties to Celanese through the device of

a damage award (App. A-6). The antidumping laws were "designed to prevent actual or threatened harm to a domestic industry caused by the sale of merchandise in the United States at prices lower than in the country of origin." *J.C. Penney Co. v. United States Treasury Department*, 439 F.2d 63, 64 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971). This Congressional design is implemented by imposing antidumping duties based on the difference between an importer's price in the United States and his price in his home markets, in order to cause the importer to raise his prices in the United States. If, in a collateral attack, an importer could obtain a damage award to compensate him for the antidumping duties imposed upon him, the importer would have no reason to raise his prices in the United States. He could simply continue to sell his product at less than fair value, in derogation of the Commission's determination (App. A-5).

Moreover, if a federal district court or state court had jurisdiction over actions such as this, an importer could maintain two simultaneous attacks on a determination by the Commission: a direct attack in the Court of International Trade and a collateral attack in a district court or state court. This would result in a duplicative burden on courts and litigants, to say nothing of raising the specter of inconsistent results.

In addition, if it were decided by the district court or state court that perjury had been committed before the Commission, that court would then have to decide whether the Commission would have reached a different conclusion absent such perjury (App. A-5; App. B-5). To resolve this issue, the court would have to review the entire record before the Commission and then, putting aside the perjured testimony, make its own independent evaluation of likelihood of injury. Such a review would require the court to consider the "unique combination and interaction of many economic variables" evaluated by the Commission in making its determination. *Armstrong Brothers Tool Co. v. United States*, 483 F.Supp. 312, 328 (Cust. Ct.), *aff'd*, 626 F.2d 168 (C.C.P.A. 1980). It would require the court

to identify the factors that led the Commission to its determination and to assess the weight that was given to each factor. It might even require the court to compel testimony by the Commissioners themselves about their deliberative processes.

All of this would be disruptive and destructive of the integrity of the processes of the Commission and of the Court of International Trade, and would "significantly undermine Congress' 'complete system of corrective justice with respect to matters arising under the customs laws.' " *See J.C. Penney Co. v. United States Treasury Department*, 439 F.2d 63, 65 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971), quoting *Cottman Co. v. Dailey*, 94 F.2d 85, 88 (4th Cir. 1938).

Alberta Gas contends, however, that dismissal for lack of subject-matter jurisdiction is inconsistent with this Court's decision in a patent case, *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916) (Petition at 14-15). That case construed 28 U.S.C. § 1338(a), which confers on the federal courts exclusive jurisdiction over cases "arising under" the federal patent statutes. Section 1338(a), unlike former 28 U.S.C. § 1582(a) and 28 U.S.C. § 1581(c), does not vest in a specialized court exclusive jurisdiction over all "civil actions" challenging determinations by a specialized tribunal. The scope of the exclusive jurisdiction of the federal courts under section 1338(a) is therefore not relevant to the scope of the exclusive jurisdiction of the Court of International Trade.

Directly in point is *Nichols v. Alker*, 231 F.2d 68 (2d Cir.), *cert. denied*, 352 U.S. 829 (1956). There, in a diversity action, the plaintiffs alleged that they had been injured by perjury in a proceeding before the Securities and Exchange Commission. The Court of Appeals concluded that another federal court, the "enforcement court", had been vested by statute with exclusive jurisdiction to review the SEC's determination. Although the plaintiffs argued that their so-called "tort action" did not seek review of the SEC's determination, the Court of Appeals affirmed dismissal of the complaint on the ground

that courts other than the enforcement court lacked subject-matter jurisdiction:

> "We hold that through the device of an apparently independent tort action the plaintiffs below may not bypass the Commission and the enforcement court in an effort to alleviate their treatment under the plan approved by the reorganization decree." 231 F.2d at 79.

Nor, in the case at bar, may Alberta Gas, through the same device of "an apparently independent tort action," bypass the Commission and the Court of International Trade by a collateral attack on the Commission's determination.

CONCLUSION

Celanese respectfully requests that Alberta Gas's Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit be denied.

Respectfully submitted,

JOHN ASA ROUNTREE, III
(Counsel of Record)
STEVEN KLUGMAN
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022
(212) 909-6000

Attorneys for Respondents
Celanese Corporation and
Celanese Chemical Company, Inc.

November 4, 1982

APPENDIX 1

1. 28 U.S.C. § 1582 [repealed]

(a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision, including the legality of all orders and findings entering into the same, involves: (1) the appraised value of merchandise; (2) the classification and rate and amount of duties chargeable; (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury; (4) the exclusion of merchandise from entry or delivery under any provisions of the customs laws; (5) the liquidation or reliquidation of an entry, or a modification thereof; (6) the refusal to pay a claim for drawback; or (7) the refusal to reliquidate an entry under section 520(c) of the Tariff Act of 1930, as amended.

(b) The Customs Court shall have exclusive jurisdiction of civil actions brought by interested parties under sections 516 and 516A of the Tariff Act of 1930, as amended.

(c) The Customs Court shall not have jurisdiction of an action unless (1) either a protest has been filed, as prescribed by section 514 of the Tariff Act of 1930, as amended, and denied in accordance with the provisions of section 515 of the Tariff Act of 1930, as amended, or if the action relates to a decision under section 516 and 516A of the Tariff Act of 1930, as amended, all remedies prescribed therein have been exhausted, and (2) except in the case of an action relating to a decision under section 516 and 516A of the Tariff Act of 1930, as amended, all liquidated duties, charges or exactions have been paid at the time the action is filed.

(d) Only one civil action may be brought in the Customs Court to contest the denial of a single protest. However, any number of entries of merchandise involving common issues

may be included in a single civil action. Actions may be consolidated by order of the court or by request of the parties, with approval of the court, if there are common issues.

(e) The Customs Court shall have exclusive jurisdiction of any civil action brought by a party-at-interest to review a final determination made under section 305(b)(1) of the Trade Agreements Act of 1979. For purposes of this subsection, the term "party-at-interest" means—

(1) a foreign manufacturer, producer, or exporter, or a United States importer of merchandise which is the subject of a final determination under section 305(b) of the Trade Agreements Act of 1979,

(2) a manufacturer, producer, or wholesaler in the United States of a like product,

(3) United States members of a labor organization or other association of workers whose members are employed in the manufacture, production, or wholesale in the United States of a like product, and

(4) a trade or business association a majority of whose members manufacture, produce, or wholesale a like product in the United States.

(f) The Customs Court shall have exclusive jurisdiction of any application for the issuance of a protective order under section 777(c)(2) of the Tariff Act of 1930.

2. 28 U.S.C. § 1581

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

(b) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930.

(c) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.

(d) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act;

(2) any final determination of the Secretary of Commerce under section 251 of the Trade Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act; and

(3) any final determination of the Secretary of Commerce under section 271 of the Trade Act of 1974 with respect to the eligibility of a community for adjustment assistance under such Act.

(e) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review any final determination of the Secretary of the Treasury under section 305(b)(1) of the Trade Agreements Act of 1979.

(f) The Court of International Trade shall have exclusive jurisdiction of any civil action involving an application for an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930.

(g) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any decision of the Secretary of the Treasury to deny or revoke a customhouse broker's license under section 641(a) of the Tariff Act of 1930; and

(2) any order of the Secretary of the Treasury to revoke or suspend a customhouse broker's license under section 641(b) of the Tariff Act of 1930.

(h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

(j) The Court of International Trade shall not have jurisdiction of any civil action arising under section 305 of the Tariff Act of 1930.

APPENDIX 2

U.S. Department of Justice
Criminal Division
Office of the Assistant Attorney General
Washington, D.C. 20530

December 4, 1981

Michael Stein, Esq.
General Counsel
International Trade Commission
Washington, D.C. 20436

Dear Mr. Stein:

On August 21, 1981, we received a referral from your office regarding the proceedings held by the International Trade Commission in case AA1921-202 to determine whether the importation of methyl alcohol (methanol) by foreign producers should be subject to dumping duties under the Anti-dumping Act of 1921, as amended. The documents submitted to us reflect that a petition has been filed with the Commission by Alberta Gas and Chemicals, Ltd. ("Alberta"), a Canadian producer of methanol, which alleges that a representative of the Celanese Corporation, a U. S. producer of methanol, committed perjury and made false statements in testimony during these proceedings in violation of 18 U.S.C. §§ 1621 and 1001.

The history of this referral is somewhat complex, but should be briefly stated here. As a result of complaints made to the Treasury Department by domestic producers of methanol, Treasury conducted an antidumping investigation and, on March 23, 1979, concluded that methanol imported from Canada was being sold in the United States at less than fair market value.

The second stage of the dumping investigation, where the statements in question were made, was the proceedings con-

ducted by the Commission to determine if such importations and sales were likely to result in injury to the domestic industry. In a 3 to 2 decision rendered on June 29, 1979, the Commission found such injury, but this decision was subsequently overturned by the U.S. Court of International Trade ("USCIT").

Thereafter, and as a result of collateral civil litigation brought by Alberta, Alberta filed a petition before the Commission requesting it to find that Celanese had misrepresented and omitted material facts during the Commission proceedings, and that the Commission would not have found injury to domestic industry but for these misrepresentations. Your referral further indicates that the Commission has denied Alberta's petition on the grounds that its finding of injury has been mooted by the USCIT's reversal of this decision and, on the further grounds that it is not competent to determine whether Celanese violated 18 U.S.C. § 1001 (false statements to a Government agency) and § 1621 (perjury and false declarations).

In support of its allegations, Alberta's petition cites, *inter alia*, the following testimony, on May 15, 1979, by Thomas Kennedy, Business Director of Methyl and Nylon Chemicals of Celanese Company:

> *Vice Chairman Albergers*:
>
> * * *
>
> What about expansion plans at the moment?
>
> *Mr. Kennedy*: At the moment we have no finalized expansion plans. We are conducting a feasibility study in Saudi Arabia. I think that was mentioned earlier. We are conducting a number of studies in other areas. We have no finalized plans for expansion.

Alberta asserts that at the time this statement was made, Celanese companies were "actively moving toward" the prompt construction of major world-scale methanol producing plants in Alberta, Canada and the U. S. and, that less than 90 days after this Commission's determination, its subsidiary

(Celanese of Canada) announced its intention to build a $250 million methanol plant in Alberta and within six months announced that it was actively considering a billion dollar plant in the U. S.

We do not believe that the above-quoted testimony presents a suitable prosecutive vehicle under 18 U.S.C. 1001 or 1621.

Mr. Kennedy's testimony is qualified in two significant respects. First, Mr. Kennedy testified that we have no *finalized* expansion plans, which is a subjective characterization. Second, and in any event, criminal litigation premised upon such testimony would merely become a semantical contest over the meaning of the term "finalized." In this regard, Mr. Kennedy's use of the term "finalized" suggests that there were, in fact, plans under consideration. Indeed, he so indicated two sentences later in his testimony wherein he stated, "We are as well conducting a number of studies in other areas."

Additionally, if the precise nature of Celanese's plans was of significance to the Commission, we believe that Mr. Kennedy's response clearly invited it to pursue both the kind of plans Celanese had and the degree of finality or lack of finality of such plans.

As the Supreme Court stated in *U. S. v. Bronston*, 409 U.S. 352, 357-59 (1973), an unsuccessful prosecution for false statements to the grand jury,

> But we are not dealing with casual conversation and the [perjury] statute does not make it a criminal act for a witness to wilfully state any material matter *that implies* any material matter which he does not believe to be true. . . . we perceive no reason why Congress would intend the drastic sanction of a perjury prosecution to cure a testimonial mishap which could readily have been reached with a single additional question by counsel alert—as every examiner ought to be—to the incongruity of petitioner's unresponsive answer. Under the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers which are not entirely responsive. Sometimes the witness does not un-

> derstand the question, or may in an excess of caution or apprehension read too much or too little into it. . . . It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.
>
> It is no answer to say that here the jury found that petitioner intended to mislead his examiner. A jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner; the state of mind of the witness is relevant only to the extent that it bears on whether "he does not believe [his answer] to be true." To hold otherwise would be to inject a new and confusing element into the adversary testimonial system we know. Witnesses would be unsure of the extent of their responsibility for the misunderstandings and inadequacies of examiners, and might well fear having that responsibility tested by a jury under the vague rubric of "intent to mislead" or "perjury by implication."

Alberta's assertion that Celanese subsidiaries were "actively moving toward prompt construction of methanol plants" is their subjective characterization of activities. Literally speaking, the most intricate plans may not be finalized until all construction and financing contracts are signed, or perhaps not even until the first spike is driven. In this regard, if plans were truly final, it would not seem necessary to use such a description as "actively *moving toward* prompt construction," which inherently suggests that differences in this matter are those of degree and opinion.

Similarly, Celanese's announcement six months after the Commission's ruling, that it was "actively considering" a billion dollar plant in the U. S. suggests merely what it says and is not inconsistent with the testimony that there were no

finalized plans. Moreover, even if plans were being actively considered prior to Mr. Kennedy's testimony, subjective and objective differences between finalized plans and non-finalized plans may be as varied as the contingencies that can result in modification or abandonment.*

Alberta's petition further alleges that Mr. Kennedy testified falsely and omitted material facts when he stated, "We believe that there is sufficient capacity in the U. S. with announced plans and expansions to satisfy U. S. demand for methanol . . . I'm talking about a three to four year time period . . ." In this regard, Mr. Kennedy did not state an objective fact, but a belief. Additionally, his statement is not merely an opinion as to past occurrences, but is an estimate or prediction of the future, which may and can be a combination of personal speculation, and/or innumerable factors contained in, or extrinsic to internal company documents. Nor do we see anything in Alberta's complaint which is squarely inconsistent with this testimony, including estimates made months after the fact by a Canadian Celanese subsidiary, of percentages of methanol that could be supplied to the U. S. in the future, by a plant that could be built in the future. Of similar import is Mr. Kennedy's speculation as to percentages of domestic increases in the demand for methanol in the future, which Alberta has contrasted in its complaint to opinions of percentages of future increases in U. S. consumption of methanol, which were made in Canada months later by a subsidiary of Celanese.

We also do not believe that the foregoing instances of Mr. Kennedy's testimony would present a suitable prosecutive vehicle under a theory that he willfully omitted material facts, in violation of 18 U.S.C. 1001.

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* The Commission and Court decisions supplied to us reflect that Alberta, the complaintant, also had plans to build facilities, but that there were a number of contingencies which could affect the implementation of these plans, such as financing, market changes and international trade agreements (Exhibit E, pp. 18-21). Interestingly enough, a majority of the Commission also surmised that the implementation of construction plans by Alberta was contingent upon the Commission's decision in the dumping proceeding.

Mr. Kennedy's estimates as to future increases in consumption, for example, do not clearly lead themselves, in this case, to omissions of material facts, since his opinion or speculation was neither disguised as a fact, nor do the differing opinions become facts merely because they differ. Both estimates necessarily and obviously involved predictions as to the future, so that none of the estimates may turn out to be correct; or, time as well as foreseen and unforeseen changes in conditions may show Mr. Kennedy's prediction to have been the most astute.

Of equal significance is the fact that the Commission selected the areas of inquiry and, if the details of Celanese's construction plans, or its estimates of future demand and consumption were material to its proceedings it was free to pursue Mr. Kennedy's answers further. *See U. S. v. Bronston*, *supra*, 409 U.S. at 358 n. 4. Thus, allegations that Mr. Kennedy concealed or withheld information, and that such information was material, requires the sort of speculation which is impermissible in a criminal prosecution.

Accordingly, we respectfully decline prosecution in this matter.

Sincerely,

/s/ D. LOWELL JENSEN
D. Lowell Jensen

Assistant Attorney General
Criminal Division